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No. 94-549

IN THE

Supreme Court of the United States

October Term, 1994

LAKEWOOD ENGINEERING & MANUFACTURING, INCORPORATED,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and LOCAL 743, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONER IN REPLY

WILLIAM R. SULLIVAN, JR.
(Counsel of Record)
TERRENCE T. CREAMER
AMY E. SHERMAN

Of Counsel:
FRANCZEK, SULLIVAN, MANN, CREMENT, HEIN RELIAS, P.C.
Suite 3400
300 South Wacker Drive
Chicago, Illinois 60606-6785
(312) 986-0300

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ARGUMENT

In its response,[1] the Government makes the following assertions: (1) no conflict exists between the Seventh Circuit decision and any other court of appeals decision; (2) no contemporaneous explanation for the use and display of a camera by Union agents on election day is necessary when the photographs are taken only of union supporters; and (3) the Seventh Circuit's reference in its opinion to the lack of subjective evidence on the employee's reactions to

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[1]The Brief for the National Labor Relations Board in Opposition will be hereinafter cited as "Gov. Br. ___." The Petition for Writ of Certiorari will be hereinafter cited as "Pet. App. ___").

the Union's photography was meaningless. Each of these assertions are wrong.

To begin with, the Seventh Circuit decision is directly at odds with the Board's precedent established in *Pepsi-Cola Bottling Co.*, 289 N.L.R.B. 736 (1988), and later recognized by the Eighth Circuit in *Millard Processing Services, Inc. v. NLRB*, 2 F.3d 258, 263 (8th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 922 (1994). In *Pepsi-Cola*, the Board stated that the use of a camera by Union agents without contemporaneously explaining the purpose for the picture-taking to the employees would "reasonably tend to interfere with employee free choice in the election."

Pepsi-Cola, 289 N.L.R.B. at 737. Here, it is undisputed that Union officials Jose Galvan and Rico Cristo provided no explanation to the voters when they openly displayed and used a camera during the election at polling places located at Petitioner's Sacramento and Carroll Street facilities. Pet. App. at 29a - 30a.

The Government, however, would excuse all that as harmless, asserting that the Union merely has to concoct an after-the-fact explanation to somehow negate the intimidating effect of this activity on the voters.[2] The

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[2] The Seventh Circuit noted that the Union did not provide a reason for its photography until five weeks after

Government's reasoning overlooks the obvious point that the voters were not privy to this supposed benign purpose at the time of the election.

The Government also cites *Nu Skin Int'l, Inc.*, 307 N.L.R.B. 223 (1992), for the proposition that "photographs by a union of pro-union supporters are not coercive regardless of whether the union has offered the employees a reason for taking them" (Gov. Br. 7). The union in *Nu Skin*, however, did supply a contemporaneous explanation for the

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the election, "allowing the Union plenty of time to come up with a justification for its actions." Pet. App. 37a. The Court characterized the Union's explanation that the photos were intended to be used in the Union newsletter as "dubious." Pet. App. at 27a.

picture-taking. In *Nu Skin*, the union took photographs of employees who voluntarily attended a union-sponsored luncheon the day before the election. *Nu Skin*, 307 N.L.R.B. at 223. The union agents reassured the employees that the camera was there to "remember this fun-filled memory" of the luncheon and joked that they would all "make the front page of USA Today." *Id.* at 225. The Board concluded under these circumstances that the "Union's photographing of employees enjoying a voluntarily attended picnic does not reasonably suggest . . . [a retaliatory] purpose." *Id.* at 224.

Unlike *Nu Skin*, the display and use of the camera outside the two polling

places on three separate occasions on election day was no photo session at a union-sponsored picnic. The record establishes that Petitioner's employees at its Sacramento facility were involuntarily subjected to a Union-led crowd, armed with pennants and a megaphone, who congregated around the entrance to the narrow driveway used by the employees on the morning of the election to report to work and cast their votes. Pet. App. at 7-8. In the midst of this commotion, Cristo was strategically positioned on the driver's side of this entranceway while taking pictures of the scene. Pet. App. at 14. In fact, Cristo testified at the hearing

that he pointed his camera in the direction of the driveway while at least thirty-five cars entered. Pet. App. at 14 n.3.

Moreover, Galvan walked around sporting a 35-millimeter camera throughout the evening voting period at the Carroll Street facility. Pet. App. at 18. Galvan snapped several flash shots at the front entrance of the Carroll Street facility which led to the polling place, including one time when an employee exited a car and entered the building. Galvan also photographed at least two Lakewood employees in the tool room of the Carroll Street facility. *Id.*

The Government would excuse the tool reason incident as innocuous because the two employees had already voted. Significantly, however, the record relied on by the Government (Gov. Br. 8) does not support its assertion that the two employees had voted prior to the incident. There is nothing in the record which even indirectly addresses the issue of their voting. Furthermore, the Government's assertion that these employees had to tell their co-workers about the incident ignores the reality that the open use and display of the camera by Union agents throughout the election day ensured widespread

dissemination of the Union's surveillance activities.[3]

The Government's dismissal of the tool room incident through an empty recitation of the facts in *Intercontinental Mfg. Co.*, 167 N.L.R.B. 769 (1967) does not undermine the applicability of the Board's ruling in that case here. In *Intercontinental Mfg. Co.*, the Board held that "to evaluate properly the probable effect of conduct which is coercive in nature, the number of instances of interference, or the

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[3]In fact, as the Seventh Circuit noted, the Hearing Officer failed to make any findings as to whether Galvan's picture-taking of the two employees had a coercive effect on other employees. Pet. App. at 8a.

number of employees directly involved, cannot serve as determinative factors." 167 N.L.R.B. at 770. Despite the standard established in *Intercontinental Mfg. Co.*, the Board and the Court dismissed the tool room incident as isolated because it involved one photograph of only two employees.

Finally, the Seventh Circuit's statement about the lack of any testimony on the subjective reactions of employees to the Union's picture-taking was not simply an idle and meaningless comparison to *Nu Skin*. On the contrary, the Court characterized Petitioner's lack of subjective evidence as a *failure*. Pet App. at 36a. A further indication that

the lack of subjective evidence played a role in the Court's analysis was its pronouncement that it will not tolerate "photography that intimidates, coerces, or influences voters in labor elections." Pet. App. at 38a. The Court's warning suggests that photography must be coercive in fact for a finding that such conduct interfered with employee free choice.

In short, the Seventh Circuit insinuates that it would have reached an opposite result had Lakewood been successful in admitting subjective evidence.[4] By looking for evidence of

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[4]Lakewood attempted to introduce subjective evidence at the hearing but was not permitted to do so because of the

the employees' subjective reaction to the picture-taking, the Seventh Circuit not only ignored Board precedent, but also created a conflict among the Circuits. *See, e.g., Avecor, Inc. v. NLRB*, 931 F.2d 924, 932 (D.C. Cir. 1991), *cert. denied*, ___ U.S. ___ 112 S. Ct. 912 (1992) (the proper analysis is whether the remark had a "tendency to coerce" not whether it was in fact coercive); *NLRB v. Anchorage Times Publishing Co.*, 637 F.2d 1359, 1364 (9th Cir. 1981), *cert. denied*, 454 U.S. 835 (1981) (no requirement to present

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Board's longstanding principle "that it is impermissible to consider employee subjective reactions to determine whether employees have been threatened or coerced." *Van Leer Containers, Inc. v. NLRB*, 943 F.2d 786, 789 (7th Cir. 1991).

"evidence of actual intimidation"); *NLRB v. Brookwood Furniture, Division of U.S. Indus.*, 701 F.2d 452, 459 (5th Cir. 1983)(proper standard is tendency "to be coercive, not whether the employees are in fact coerced"). The very presence of the Union camera throughout the voting periods at Sacramento and Carroll Street tainted the election day atmosphere with a not so subtle impression of Union surveillance and a threat of reprisal.

CONCLUSION

The Seventh Circuit's decision, unlike other circuit courts, sends a message to both unions and employers that the use and appearance of photographic surveillance on election day is

acceptable as long as the challenged party comes up with a good enough excuse for this activity weeks after the election. Moreover, the Court effectively raised the standard of proof in election challenges by requiring evidence of the employees' subjective reactions to the Union's picture-taking. The Government cannot minimize the importance of these two issues by characterizing them as a quibble over factual findings. Rather, Petitioner is asking the Court to set a single standard for all jurisdictions on the use of cameras by either employers or unions during representation elections to ensure

that employees can make a free and uncoerced choice.

Respectfully submitted,

WILLIAM R. SULLIVAN, JR.
(Counsel of Record)
TERRENCE T. CREAMER
AMY E. SHERMAN

Of Counsel:
FRANCZEK, SULLIVAN, MANN, CREMENT, HEIN, RELIAS, P.C.
Suite 3400
300 South Wacker Drive
Chicago, Illinois 60606-6785
(312) 986-0300

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